Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO W-01(f)-44–10 OF 2013 (W)
ZULKEFLI MAKINUDIN CJ, SURIYADI, HASAN LAH, ABU SAMAH AND ZAHARAH IBRAHIM FCJJ
26 OCTOBER 2015

Contract — Agreement — Construction — Construction contracts — Levy under s 34 of the Construction Industry Development Board Act 1994 — Whether imposition of levy excludes non-construction components of construction work and works performed offshore — Whether levy to be imposed upon whole contract price or only part of it — Whether to be given strict of purpose interpretation — Construction Industry Development Board Act 1994 s 34

The appellant was authorised to impose a levy of a quarter per cent of the contract sum on every registered contractor while the respondent was a registered contractor under the Construction Industry Development Board Act 1994 ('the Act') and a consortium of five contractors. The respondent was awarded a contract in the sum of USD1,481,254,000 plus Euro59,640,000 to participate and construct a national gas plant and had entered into a formal construction agreement with the owner ('EPCC contract'). The appellant imposed a levy of RM13,129,934.05 on the respondent. The respondent disputed the levy sum and only paid RM2,802,130.02 because it was argued that the latter amount was the correct levy, arrived at by disregarding sums attributed to the 'offshore works' and the 'non-construction works'. The appellant claimed for the balance price of RM10,327,803.84 at the High Court. The High Court ruled in favour of the respondent and found that the appellant had misconstrued the Act, together with the relevant documents, causing it to levy an incorrect amount under the Construction Industry (Collection of Levy) Regulations 1996. The Court of Appeal dismissed the appellant's appeal. Hence, the present appeal.

Held, allowing the appeal:

(1) A levy is a tax and in this case was created by the Act. Taxing statutes like all other statutes must be given a purposive interpretation to fulfill the objective of the statute, unless the circumstances demand otherwise. The language of a statute imposing a tax, duty, charge or levy must be strictly construed, and with no intendment permitted. Words must be given

their ordinary meaning. Nothing is to be read in, and nothing is to be implied, and once that meaning is clear due regard must be given to them (see paras 43–44).

(2) The contract awarded to the respondent was a lump sum turnkey contract and hence not divisible. This view was sufficient to answer the submission of the respondent that the levy under s 34 of the Act is restricted to the construction works, which excluded non-construction works such as engineering, procurement, supervision, management, and other ancillary services. Under a lump sum contract, price is agreed upon by parties before the works begin. It is a single whole construction contract as opposed to a divisible contract (see paras 50 & 58).

(3) Going by the natural meaning, the engineering design procurement works, that form part of the 'construction works', include all 'integral and preparatory' work that will lead to a successful performance of the contract. Surely no construction works may be carried out satisfactorily without the requisite design, drawings, supervision or planning preceding it (see para 63).

(4) The explicit factoring of the levy into the contract price showed that the parties expected offshore transactions and non-construction works to take place. Clearly levy was expected to be imposed on them. As the commercial transaction was undertaken through the respondent, a tax presence was created within Malaysia to enable a levy to be imposed. The levy was on the contract sum to be paid in Malaysia to the registered contractor's accounts ie the respondent, and not to individual consortium members (see paras 67–69).

[Bahasa Malaysia summary

Perayu telah dibenarkan untuk mengenakan levi satu perempat peratus terhadap jumlah kontrak atas setiap kontraktor berdaftar di bawah Akta Pembangunan Industri Pembinaan 1994 dan konsortium lima kontraktor. Responden diawardkan kontrak berjumlah sebanyak USD1,481,254,000 tambah Euro59,640,000 untuk menyertai dan membina loji gas negara dan telah memasuki perjanjian pembinaan rasmi dengan pemilik ('kontrak EPCC'). Perayu mengenakan levi sebanyak RM13,129,934.05 ke atas responden. Responden mempertikaikan jumlah levi tersebut dan hanya membayar RM2,802,130.02 kerana ia dihujahkan bahawa jumlah kemudiannya adalah levi betul, dicapai dengan tidak mengambil kira jumlah yang dikaitkan kepada 'kerja-kerja luar persisiran' dan 'kerja-kerja bukan pembinaan'. Perayu menuntut untuk harga baki sebanyak RM10,327,803.84 di Mahkamah Tinggi. Mahkamah Tinggi memutuskan memihak responden dan mendapati bahawa perayu telah salah tafsir Akta, bersama dengan dokumen relevan, menyebabkannya melevikan jumlah yang tidak betul di bawah Peraturan-Peraturan Industri Pembinaan (Pungutan Levi) 1996.

Mahkamah Tinggi menolak rayuan perayu. Maka, rayuan ini. A

Diputuskan, membenarkan rayuan:

(1) Levi adalah cukai dan dalam kes ini dibentuk oleh Akta. Statut percukaian seperti kesemua statut yang lain mesti diberikan tafsiran maksud untuk memenuhi objektif statut, kecuali keadaan mengkehendaki sebaliknya. Bahasa statut yang mengenakan cukai, duti, caj atau levi mesti ditafsirkan dengan ketat, dan tanpa niat sebenar dibenarkan. Perkataan-perkataan mesti diberikan maksud biasanya. Tiada apa-apa boleh dibaca, dan tiada apa-apa boleh tersirat, dan sebaik sahaja maksud tersebut adalah jelas pertimbangan adil mesti diberikan kepadanya (lihat perenggan 43–44). B C

(2) Kontrak yang diawardkan kepada responden adalah jumlah sekaligus kontrak turnkey dan oleh itu tidak boleh dibahagi. Pandangan ini adalah mencukupi untuk menjawab penghujahan responden bahawa levi di bawah s 34 Akta adalah dihadkan kepada kerja-kerja pembinaan, yang mengecualikan kerja-kerja bukan pembinaan seperti kejuruteraan, pemerolehan, pengawasan, pengurusan, dan perkhidmatan sampingan yang lain. Di bawah kontrak jumlah sekaligus, harga adalah dipersetujui oleh pihak-pihak sebelum kerja-kerja bermula. Ia adalah kontrak pembinaan tunggal bertentangan kepada kontrak yang boleh dibahagikan (lihat perenggan 50 & 58). D E

(3) Mengikut maksud semula jadi, kerja-kerja pemerolehan reka bentuk kejuruteraan, yang membentuk sebahagian 'kerja-kerja binaan' termasuk kesemua kerja 'penting dan persediaan' yang akan membawa kepada prestasi kontrak yang berjaya. Sudah tentu tiada kerja-kerja pembinaan mungkin dijalankan secara memuaskan tanpa reka bentuk, lukisan, pengawasan atau perancangan sebelumnya (lihat perenggan 63). F

(4) Pemfaktoran jelas levi ke dalam harga kontrak menunjukkan bahawa pihak-pihak menjangka transaksi luar persisiran dan kerja-kerja bukan pembinaan akan berlaku. Jelas levi dijangka akan dikenakan ke atas mereka. Memandangkan transaksi komersial tersebut telah dijalankan melalui responden, kehadiran cukai dibentuk di Malaysia untuk membolehkan levi dikenakan. Levi tersebut adalah ke atas jumlah kontrak yang dibayar di Malaysia kepada akaun kontraktor yang berdaftar iaitu responden, dan bukan ahli-ahli konsortium individu (lihat perenggan 67–69).] G H

I

Notes

For cases on agreement in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3255–3345.

Cases referred to

Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes [2005] 1 AC 684, HL (refd)
Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64, KBD (refd)
Clark (Inspector of Taxes) v Oceanic Contractors Ltd [1983] 2 AC 130, HL (refd)
Coker v Young (1860) 2 F & F 98 (refd)
Dilworth v Stamps Comrs [1899] AC 99, PC (refd)
Ipoh Garden Sdn Bhd v Ismail Mahyuddin Enterprise Sdn Bhd [1975] 2 MLJ 241 (refd)
Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd [2014] 2 MLJ 1, FC (refd)
Loke Yung Hong v Ng See See (F) and 3 Others [1948] 1 MLJ 123, CA (refd)
Mangin v Inland Revenue Commissioner [1971] AC 739, PC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal [2005] 3 MLJ 97, FC (refd)
Public Prosecutor v Hun Peng Khai & Ors [1984] 2 MLJ 318 (refd)
Sharpe v San Paulo Railway Company (1873) LR 8 Ch App 597, CA (refd)

Legislation referred to

Construction Industry (Collection of Levy) Regulations 1996 regs 6(1), (2), 7
Construction Industry Development Board Act 1994 ss 1(2), 2, 3, 4(1), 15, 34, 34(2), (5), (8)(2)
Interpretation Acts 1948 and 1967 s 17A
Rules of High Court 1980 O 14A

Appeal from: Civil Appeal No W-01–797 of 2010 (Court of Appeal, Putrajaya)

Cyrus Das (David Mathew with him) (Shook Lin & Bok) for the appellant.
Lim Chee Wee (Sharon Chong Tze Ying and Nimalan Devaraja with him) (Skrine) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] Lembaga Pembangunan Industri Pembinaan Malaysia ('the appellant') is a statutory body established under the Construction Industry Development Board Act 1994 ('the Act'). The Act in brief, empowers the appellant to be a one stop body to promote, and stimulate the development and improvement and expansion of the construction industry in Malaysia. The statutory powers and

many functions of the appellant are laid down in ss 3 and 4(1) of the Act. For clarification, hereinafter any section mentioned in this ground of judgment refers to section of the Act, unless stated otherwise.

[2] Under s 34(2) the appellant is authorised to impose on every registered contractor (but before the commencement of any construction works having a contract sum of above RM500,000) a levy of a quarter per centum of the contract sum. That levy is funneled to a fund set up under s 15 to enable the appellant to discharge its functions pursuant to the Act.

[3] 'Contract sum', as legislated under s 34(2), is defined under sub-s (8)(2) of s 34 to mean 'the consideration for a contract in respect of any construction works'. 'Construction works' is defined in s 2 as follows:

> 'construction works' means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of –
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) any road, harbour works, railway, cableway, canal or aerodrome;
>
> (c) any drainage, irrigation or river control works;
>
> (d) any electrical, mechanical, water, gas, petrochemical or telecommunication works; or
>
> (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works,
>
> and includes any works which form an integral part of, or preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earthmoving, excavation, laying foundation, site restoration and landscaping.

[4] The appellant under reg 6(1) of the Construction Industry (Collection of Levy) Regulations 1996 ('1996 Regulations') is the relevant authority that determines the contract sum of the construction works, for purposes of the amount of levy. Hereinafter any regulation mentioned will refer to a regulation in the 1996 Regulations unless stated otherwise. By reg 6(2), in determining the contract sum, the appellant may take into consideration the following factors:

(a) the consideration in respect of any construction works contained in the letter of acceptance, letter of award or any document that constitutes acceptance relating to the construction works;

(b) the consideration in respect of any construction works in the contract which is signed by the parties thereto; or

(c) the particulars and information in respect of the consideration relating to the execution of any contract on any construction works contained in any relevant document.

[5] In support of its appeal the appellant also alludes to the contract documents exchanged between the owner and the contractor.

[6] The seriousness of the Act is reflected adequately in s 34(5), which legislates that when a registered contractor fails to pay any levy due within a prescribed period, the contractor shall be guilty of an offence, and shall on conviction be liable to a fine not exceeding RM50,000.

[7] The respondent is a registered contractor under the Act and is a consortium of five contractors, comprising two foreign parties and three Malaysians (collectively referred to as 'the respondent') established solely to undertake the impugned construction works. Shorn of the contractual intricacies, the respondent was awarded vide a letter of award dated 29 October 1999, a contract worth USD1,481,254,000 plus Euro59,640,000 to participate and construct a national gas plant in Bintulu Sarawak, with the owner being Petronas Malaysia Liquid Natural Gas Tiga Sdn Bhd ('the owner').

[8] Another relevant contract document executed between the owner and the respondent is the formal construction agreement ('EPCC contract') dated 21 January 2000. The respondent executed among themselves a consortium agreement dated 21 January 2000 to cater for their internal arrangement, an agreement that did not include the owner.

[9] By a notification of imposition of levy dated 6 December 2000 ('the notice') under reg 7 the appellant imposed a levy at the prescribed rate of RM13,129,934.05 on the respondent.

[10] The respondent disputed the levy sum and instead argued that the correct levy was RM2,802,130.21, arrived at by disregarding sums attributed to the 'offshore works' and the 'non-construction works'. Ignoring the full amount in the notice the respondent only paid RM2,802,130.02 thus leaving unpaid a balance of RM10,327,803.84. The appellant then filed an action at the High Court for the balance.

[11] To dispose of the matter the appellant filed an O 14A of the High Court Rules action. Having gone through the questions, the High Court judge summed up the issues before him in the following manner, viz whether a levy could be imposed under the Act on construction works which was undertaken outside Malaysia, and whether construction works under the Act would include non-construction works such as engineering, procurement,

supervision, management and other ancillary services.

[12] The High Court judge ruled in favour of the respondent and found that the appellant had misconstrued the Act, together with the relevant documents, causing it to levy an incorrect amount under the 1996 Regulations.

[13] Being dissatisfied, the appellant appealed to the Court of Appeal but lost. On 2 September 2013 the appellant successfully obtained leave from this court on the following questions of law:

(a) whether the plaintiff ('the appellant') has construed the CIDB Act and the relevant documents wrongly and determined and imposed an incorrect levy amount (according to reg 6 of the Construction Industry (Collection of Levy) Regulations 1996), in particular:

  (i) whether construction works done offshore as part of construction works within Malaysia fall within the definition of 'construction works' as found in s 2 of the CIDB Act (and hence are outside the ambit of s 34) given that such works are to be performed outside Malaysia;

  (ii) whether the imposition of the levy under s 34 of the CIDB Act excludes the non-construction components of a construction work, namely engineering, procurement, supervision, management, and other ancillary services;

  (iii) whether the imposition of the levy under s 34 of the CIDB Act excludes the non-construction works performed offshore such as engineering, procurement, supervision, management, equipment and materials supplied on an FOB basis, and other ancillary services; and

  (iv) whether or not the contract in fact is a supply contract coupled with a construction contract, which was consolidated in one contract for convenience and efficiency; and if so whether the supply contract should be subject to a levy under the CIDB Act; and

(b) whether the plaintiff is entitled to interest notwithstanding that the CIDB Act does not provide for interest and if so, how is the interest to be calculated?

SUBMISSIONS OF PARTIES

The appellant's submission

[14] The appellant began by submitting that levy was imposable under the Act on a registered contractor for construction works where the contract sum exceeded RM500,000.

[15] It submitted that the respondent was a registered contractor under the Act, comprising a consortium of five contractors, two being foreign parties and three being Malaysians, established solely for the purpose of undertaking the present construction works. Evidentially the certificate of registration dated 28 June 2000 was issued in favour of the respondent as a single entity.

[16] With the full contract sum for the project being USD1,481,254,000 plus Euro59,640,000 the respondent clearly qualified to be imposed with a levy under the Act.

[17] The appellant clarified that this was an EPCC contract ie an engineering, procurement, construction and commissioning contract. It was a single purpose turnkey contract, subject to fixed pricing, and not based on bills of quantities which could be varied. In a word it was a contract that was indivisible.

[18] In support of its argument, the appellant referred to the letter of award dated 29 October 1999 (see Tab 3, ACB Vol 2), where it is stated that 'The contract is awarded to you based on your commitment to a fixed non-escalating lump sum contract price (inclusive of taxes, duties and other related costs) of USD1,481,254,000 plus Euros59,640,000'.

[19] The appellant ventilated that the contract sum constituted the cost of all the resources (including the onshore and offshore portion), and covered the equipment, materials, labour, transportation and all other things necessary for the due execution and completion of the project. There was no justification to divide the contract sum into different parts according to the works done by the individual member contractors.

[20] The appellant was not concerned as to how the resources (be it equipment or material) were procured, whether offshore or onshore. As long as the equipment or the other resources were components of the construction works, they were subject to levy imposition.

[21] The appellant further submitted that from the outset, as per the letter of award, the contract price was also inclusive of taxes and duties by which the contractor could be made liable. Under art 8.1 of the EPCC contract, the contractor undertook to pay, inter alia, 'levies' of 'whatever nature' in connection 'with the Work and payment of the contract price'.

[22] On the legal aspect, counsel for the appellant submitted that the definition of the word 'construction works', was an enlarged definition under the Act. It was argued that there was no particular word within the definition that fell for interpretation that warrants the application of the maxim 'noscitur a sociis'.

[23] To explain its stance the appellant cited the example of the term 'WORK' which was defined in a comprehensive way as a single whole, and not by reference to any divisible components. Article 2 of the EPCC contract was wide enough in its scope to include all things, and not limited to the preparation and supply, the purchase and manufacture, the provision of all necessary construction equipment, the mobilisation and controlling of adequate labour force, commissioning and testing of the project etc.

[24] The appellant submitted that it was envisaged by all parties that the preparatory and supply elements were included. That meant the contract was a comprehensive contract which encompassed both construction and non-construction components and falling within the definition of 'works'.

[25] Learned counsel for the appellant submitted that the levy was for a construction project within the jurisdiction. It was not disputed that the respondent was a registered contractor in Malaysia for purposes of contract works, with the levy imposed on the respondent as the contractor, and not on its individual consortium members.

[26] The appellant clarified that it was only the design work and the procurement of materials that were done offshore, to be brought into Malaysia eventually for the contract works. In short, it was submitted that the above circumstances created enough of a tax presence within Malaysia, to make the levy a Malaysian levy, rather than an extraterritorial levy.

The respondent's submission

[27] In reply, learned counsel for the respondent submitted that the nature of the relationship between the respondent's component members could be gauged from art 2.4 of the consortium agreement which states that 'In no event shall the parties hereto consider the CONSORTIUM to be, or in any way acts

as though as it were, a corporation, partnership or any other form of entity having any independent legal personality whatsoever'.

[28] The respondent clarified that it was a consortium of contractors comprising JGC Corporation of Japan, Kellogg Brown Root Inc of USA, Sime Engineering Sdn Bhd, JGC (Malaysia) Sdn Bhd, and Kellogg (Malaysia) Sdn Bhd The latter two are Malaysian subsidiaries of the first two foreign corporations, all of which are part of the contractual arrangements between themselves, jointly and severally guaranteeing the due performance of the contract works.

[29] In essence, it was argued that the respondent was not a single legal entity but a group of companies that came together to collaborate and work on a contract.

[30] The respondent clarified that the structure of the EPCC contract was drawn up in accordance with the owner's instructions as it was not the latter's practice to split the offshore and onshore works into two contracts.

[31] The respondent highlighted that the EPCC contract provided for offshore contract price to be paid to the non-Malaysian incorporated members for works performed outside Malaysia, whereas onshore contract price would be paid to the Malaysian incorporated members for works performed within Malaysia.

[32] The respondent submitted that the levy under s 34 was restricted to the construction works component of the EPCC contract, and excluded non-construction works such as engineering, procurement, supervision, management, and other ancillary services.

[33] The respondent submitted that the definition of 'construction works' in s 2, focused on the physical work performed, and the works mentioned in paras (a) to (e) of the definition therefore must not stray from the physical nature of all works described in the definition and must necessarily be works carried out on-site. Thus, the contract sum constituted the cost of all the resources excluding the offshore portion when it came to the levy imposition under s 34.

[34] The respondent submitted that it was crucial to read the definition of 'construction works' harmoniously, and as parts of an integral whole, and as being interdependent.

[35] Applying the 'noscitur a sociis' principle, paras (a) to (e) and the examples of works must be read together, in order to ascertain the true meaning

of the phrase 'an integral part of, or are preparatory to or temporary for the works described in paras (a) to (e)'. In this regard, the respondent submitted that the court ought to take into account the words or phrases preceding the words which were being interpreted to ensure that they were of the same kind (*ejusdem generis*) with the rest of the definition, and the Act as a whole, and referable to the same subject matter.

[36] The respondent relied on s 1(2), which states that the application of the Act is confined to Malaysia, hence not having any extraterritorial application. No levy thus could be imposed on offshore works. In the instant case, the respondent highlighted that the design, procurement and engineering works were all works performed outside of Malaysia, ie offshore.

[37] That being the case the appellant had no power to impose any levy on works carried out and performed outside of Malaysia hence exceeding its authority.

DECISION

[38] We begin by briefly discussing the mode of action, which alludes to O 14A of the Rules. This order enables the High Court to determine any question of law or construction of documents arising in any cause or matter at any stage of the proceedings, where to the court such questions are suitable for determination without going through a full trial, and that determination will dispose of the entire matter. In order to do that it is crucial that all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted. In a gist there are no substantial factual disputes left to be resolved. In *The Malaysian High Court Practice* (2001 Desk Ed) at para 14A.1.3 the writers authored:

> The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted. This postulates that there is no dispute or no further dispute exists as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action.

[39] From the submission and evidence before us, we are satisfied that the factual issues are way past behind us, with the remaining dispute centering on the construction of a provision of the Act, the 1996 Regulations and the interpretation to be given to the contractual documents, namely the letter of award, the EPCC contract and the consortium agreement.

[40] We note that the appellant viewed the construction works under the EPCC contract as a single composite transaction for levy purposes under the Act.

[41] We accept that the appellant is entrusted to determine the contract sum in respect of any construction works ie after a perusal of the contract documents exchanged between the owner and the respondent.

[42] We noted the respondent's position of certain construction works undertaken outside Malaysia, and of non-construction works such as engineering, procurement, supervision, management and other ancillary services to be excluded for calculation of the levy. We noted too of the respondent's stance that the construction works under the EPCC contract were divisible, with only certain components being subject to levy. It was on that basis that it was willing to pay RM2,802,130.02 to the appellant.

[43] A levy is a tax and in this case was created by the Act. It is well settled that the language of a statute imposing a tax, duty, charge or levy must be strictly construed, and with no intendment permitted. Words must be given their ordinary meaning. Nothing is to be read in, and nothing is to be implied, and once that meaning is clear due regard must be given to them. Any ambiguity detected must lean in favour of the taxpayer charged with paying the tax, duty, charge or levy (*Mangin v Inland Revenue Commissioner* [1971] AC 739; *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64).

[44] The above general principles of interpreting a tax imposing statute are still woven into the fabric of the principles of construction of taxing provisions despite the introduction of s 17A of the Interpretation Acts 1948 and 1967. Section 17A of the latter Act enjoins a purposive reading to be undertaken when interpreting a statute; with such statutory backing, a literal and blinkered approach must now compete with the context and purpose of the Act as legislated by Parliament. With a litany of cases in abundance, it is now well established that taxing statutes like all other statutes must be given a purposive interpretation to fulfill the objective of the statute, unless the circumstances demand otherwise.

[45] In this connection, it is useful to make reference to the decision of the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97 where the court spoke of the application of the *Ramsay* principle emphasising the purposive interpretation of taxing statutes. To make it clearer, we highlight the relevant portion and it reads:

> 29 *The Ramsay case* [1982] AC 300 liberated the construction of revenue statutes from being both literal and blinkered. It is worth quoting two passages from the

influential speech of Lord Wilberforce. First, (at p 323) on the general approach to construction:

> What are 'clear words' is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded.

30 Secondly (at pp 323–324), on the application of a statutory provision so construed to a composite transaction:

> It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded.

31 The application of these two principles led to the conclusion, as a matter of construction, that the statutory provision with which the court was concerned, namely that imposing capital gains tax on chargeable gains less allowable losses was referring to gains and losses having a commercial reality ('The capital gains tax was created to operate in the real world, not that of make-belief') and that therefore (p 326):

> To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function.

32 The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect; of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311at p 320, para 8:

> The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.

[46] It is significant to observe that the Federal Court in the case of *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd* [2014] 2 MLJ 1 endorsed the approach in the above *Palm Oil Research Board* case, hence settling the current interpretative position in our country. This court in *Alam Maritim Sdn Bhd* said:

A

> After tracing the history of how courts treat the interpretation of taxing Acts, culminating with the promulgation of s 17A of the 1948 and 1967 Interpretation Acts and subsequent cases, the purposive approach is here to stay. The intention of Parliament therefore cannot be discounted even if the matter in the Act pertained to taxing issues.

B

[47] To wind up the discussion under this heading, the consequential effect of the rapid economic growth in this country, and where mega projects and joint ventures by Malaysian based companies together with offshore entities are no more a rarity, makes it more imperative that the objective and purpose of the
C Act be implemented. This purposive and practical approach will surely assist and fulfill the task of the appellant, together with the levy mechanism to manage, develop and regulate the construction industry, tremendously.

D **[48]** In order to answer the leave questions posed for our determination, it naturally follows that we need to decide whether s 34, upon its true construction, applies to the facts before us. And of course, we cannot but determine beforehand the details of the transaction. In *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes* [2005] 1 AC 684) the House
E of Lords opined:

> But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found.

F WHETHER THE CONSTRUCTION CONTRACT WAS A LUMP SUM CONTRACT

[49] The letter of award dated 29 October 1999 reveals that the construction contract carried a price tag of a fixed lump sum of USD1,481,254,000 plus
G Euro59,630,597m equivalent to RM5,867,062,431.93. In fact those were the very word used in the above letter as reproduced below. It reads as follows:

> ... JGC/KBR/SIME/JMSB/KMSB
>
> CONSORTIUM
>
> 3–1, Minato Mirai 2-Cnome, Nishi-Ku
>
H Yokohama 220–6–1
>
> Japan
>
> Dear Sir,
>
I LETTER OF AWARD FOR ENGINEERING, PROCUREMENT, CONSTRUCTION AND COMMISSIONING CONTRACT (EPCC) FOR LNG-3PLANT PROJECT

1 We hereby take pleasure to inform you that MALAYSIA LNG TIGA SDN BHD (MLNG TGA) has accepted your proposal to undertake the EPPC WORK for LNG-3 Plant Project situated at Bintulu, in the state of Sarawak, Malaysia.

2 ...

3 ...

4 The CONTRACT is awarded to you based on your commitment to a fixed non-escalating lump sum CONTRACT PRICE (inclusive of taxes, duties and other related costs) of US Dollars One billion, four hundred and eighty one million, two hundred and fifty four thousand (US$1,481,254,000.00) plus Euro Fifty nine million, six hundred and forty thousand (Eu 59,640,000.00).

Yours faithfully

For and behalf of

MALAYSIA LNG TIGA SDN BHD

.....

ABDULLAH BIN KARIM

PROJECT DIRECTOR

[50] Generally, under a lump sum contract a lump sum contract price is agreed upon by parties before the works begin. In a lump sum construction contract it is a single whole construction contract as opposed to a divisible contract. *The Major Law Lexicon (by P Ramanatha Aiyar)* (4th Ed) Vol 4 defines a lump sum contract as a type of contract under which the contractor agrees to undertake and complete constructional works for a given price, and if costs exceed price, the loss is borne out by the contractor. If the extra work carried out is with the principal's approval (subject to any extra conditions) that extra cost may be recoverable (*Sharpe v San Paulo Railway Company* (1873) LR 8 Ch App 597; *Coker v Young* (1860) 2 F & F 98).

[51] When discussing the issue of extra payments, Keating on *Construction Contracts* (9th Ed) at p 105 wrote:

> A lump-sum contract is a contract to complete a whole work for a lump sum eg to build a house for [a3]60,000. If the house is completed in every detail required by the contract the contractor is entitled to [a3]60,000. And if extra work was carried out it may be able to recover further payment.

[52] Having appreciated the intricacies of a lump sum contract we now move on to scrutinise the letter of award, the EPCC contract and the consortium agreement. It is obvious from the letter of award that the contract awarded to the consortium is a 'fixed non-escalating lump sum contract price ...' (p 294 RR). Call it fixed, non-escalating or lump sum, separately or collectively, the

effect is still the same ie the contract price cannot be split up. As if to emphasise the meeting of the mind, the EPCC contract at article 24.3 (when agreeing to the applicability of Malaysian law) stipulates that the respondent accepts the deeming provision of being aware that the contract price is lump sum based.

[53] The issue of the lump sum contract is connected to the submission of the appellant that this was a turnkey project. By agreeing to this submission, it means that the LNG project is to be fully operational when handed over to the owner. This submission is borne out clearly in the EPCC contract of 21 January 2000 where the following terms were agreed upon:

> AND WHEREAS OWNER wishes CONTRACTOR to undertake the complete realisation of the aforesaid PROJECT in accordance with the terms and conditions as hereinafter specified.

[54] Perusing further the other terms of the EPCC contract the respondent in the recital has undertaken to complete the project in accordance with the agreement and within the specified period of time (article 2.3 at p 306 of the RR).

[55] Having sifted the relevant documents we accept the appellant's submission that the contract entered into by the owner and the respondent was a turnkey contract. The facts fall squarely under the type of contract where it is singular in purpose and at a fixed price. Suffice if we refer to *Black's Law Dictionary* (9th Ed) (p 369), which explains 'turnkey contract' in this manner:

> engineering, procurement, and construction contract.
>
> A fixed-price, schedule-intensive construction contract – typical in the construction of single-purpose projects, such as energy plants – in which the contractor agrees to a wide variety of responsibilities, including the duties to provide for the design, engineering, procurement, and construction of the facility; to prepare start-up procedures; to conduct performance tests; to create operating manuals; and to train people to operate the facility. Also termed *turnkey contract.*

[56] We also accept the argument that the owner was never concerned with how the respondent went around completing the project. Had the owner been concerned surely it would have participated in the consortium agreement of 21 January 2000. With its financial might, and with a battery of lawyers at hand, a water tight divisible contract could easily have been drafted for the owner.

[57] The documents showed that the owner's main responsibility was the prompt payment of the contract price to the contractor once the project was completed (article 6).

[58] We therefore hold the view that the contract awarded to the respondent by the owner is a lump sum turnkey contract and hence not divisible. This view is sufficient to answer the submission of the respondent that the levy under s 34 of the Act is restricted to the construction works, which excluded non-construction works such as engineering, procurement, supervision, management, and other ancillary services. We therefore reject this submission of the respondent as reflected in paras 31 and 32 of this judgment.

SECTION 2 ('INCLUDES') – THE MEANING OF 'CONSTRUCTION WORKS' UNDER SECTION 2 OF THE ACT

[59] Despite our comprehensive view as stated at para 57 above , the respondent's argument ventilated at paras 31 and 32 may also be answered in this manner. The natural starting point is by appreciating the interpretation of 'construction works'. Section 2 of the Act reads as follows:

> 'construction works' means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of –
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) any road, harbor works, railway, cableway, canal or aerodrome;
>
> (c) any drainage, irrigation or river control works;
>
> (d) any electrical, mechanical, water, gas, petrochemical or telecommunication works; or
>
> (e) any bridge, viaduct, da, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works,
>
> and includes any works which form an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; ...

[60] The respondent argued that any works, which 'form an integral part of' or 'are preparatory to' the works in paras (a) to (e) of the definition, does not include offshore works or non-construction works. The respondent has relied heavily on the 'noscitur a sociis' principle.

[61] We are of the view under the 'noscitur a sociis' principle it may be said that the meaning of a questionable word or phrase in a statute may be ascertained by reference to the meaning of words or phrases associated with it. Apart from explaining that questionable word or phrase the accompanying words may even limit it. Abdoolcader J in *Ipoh Garden Sdn Bhd v Ismail Mahyuddin Enterprise Sdn Bhd* [1975] 2 MLJ 241 explained it in more detail

in this way:

> It is a fundamental rule in the construction of statutes that associated words (noscitur a sociis) explain and limit each other. The meaning of a doubtful word or phrase in a statute may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it. The rule 'noscitur a sociis' is frequently applied to ascertain the meaning of a word and consequently the intention of the legislature by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, ejusdem generis, and referable to the same subject-matter. Especially must it be remembered that the sense and meaning of the law can be collected only by comparing one part with another and by viewing all the parts together as one whole, and not one part only by itself.

[62] Having perused s 2 of the Act and the facts of this case, we have instead placed our reliance on the word 'includes', rather than alluding to the principle of 'noscitur a sociis'. The word includes is generally used to enlarge words or phrases in a statute, as in the current Act, with those words or phrases together with those they should include, understood to have their natural meaning (*Dilworth v Stamps Comrs* [1899] AC 99). Edgar Joseph Jr in *Public Prosecutor v Hun Peng Khai & Ors* [1984] 2 MLJ 318 at p 324 had occasion to remark that the word 'includes' is a word of extension and not of definition. Evans J in *Loke Yung Hong v Ng See See (F) and 3 Others* [1948] 1 MLJ 123 opined:

> ... one using the word 'include' indicates an extension of the ordinary meaning which may be attached to the word.

[63] Going by the natural meaning, we are satisfied that the engineering design procurement works, that form part of the 'construction works', include all 'integral and preparatory' work that will lead to a successful performance of the contract. Surely no construction works may be carried out satisfactorily without the requisite design, drawings, supervision or planning preceding it. Keating in *Law and Practice of Building Contracts* (2nd Ed) at p 59 had occasion to write:

> Lump sum contract for whole work-widely defined
>
> Indispensable necessary works
>
> Where the contractor must complete a whole work3 such as a house, or a railway from A to B for a lump sum, the *courts readily infer a promise on his part to provide everything indispensably necessary to complete the whole work.* Such necessary works are not extras for they are impliedly included in the lump sum.

Evidentially, article 2.1 of the EPCC contract also states that the term 'Work' consists of all things to be performed and services to be rendered in connection with the realisation of the project.

CONSORTIUM AGREEMENT

[64] We are aware, and did consider the fact that the division of responsibilities are well documented, as executed in the consortium agreement between the consortium partners. On the other hand we are satisfied that this division of duties was merely an internal arrangement among themselves; a clear recognition of each other's respective responsibility. The non-involvement of the owner in this consortium agreement amplifies its lack of concern for the internal arrangement.

SERIES OF TRANSACTION

[65] We find merit in the appellant's submission that although a contractual transaction may involve a series of transactions it may nevertheless be a single transaction for levy purposes. Looking at the scheme in the EPCC contract as a whole we view the transaction as a single transaction.

IMPLICATION OF THE RESPONDENT'S AGREEMENT TO PAY THE LEVIES FOR THE INDIVISIBLE CONTRACT PRICE (INCLUSIVE OF THE OFF-SHORE TRANSACTIONS AND NON-CONSTRUCTION WORKS)

[66] In the letter of award the respondent agreed to be made liable to the levies imposable on the contract price as finalised in article 8.1 of the EPCC contract. We reproduce this article below for convenience and reference:

> Without prejudice to Article 8.2 all rentals, royalties, fees, charges, taxes (including corporate and personal income tax, service and withholding taxes), levies, imposts or other duties of whatever nature required to be paid in connection (with the WORK and the payment of the CONTRACT PRICE shall be paid by the CONTRACTOR).

[67] The contract price is the total 'fixed non-escalating lump sum', tagged at USD1,481,254,000 plus Euros59,640,000 (not being divisible). The importation and reference of the whole contract sum into article 8.1 by the explicit factoring of the levy into the contract price convinced us that parties expected offshore transactions and non-construction works to take place. And clearly levy was expected to be imposed on them. As these two contentious items had not escaped the attention of both parties, the respondent was deliberately made responsible for the expected levy payment. If the respondent were to be freed of the imposable levies for the offshore contracts and non-construction works, for whatever reason, surely the EPCC contract would have made the respondent liable only to the contract price minus the expenditure of offshore and non-construction components. Therefore, not only did article 8.1 confirm the appellant's argument that this was an

indivisible contract but the respondent also anticipated to be levied for the offshore and non-construction works component.

EXTRATERRITORIALITY

[68] The respondent argued that the Act applies only to Malaysia and has no extraterritorial application; no levy therefore may be imposed on works carried out outside Malaysia, ie offshore works. On the other hand the appellant canvassed that the design work and the procurement of materials though done offshore were eventually brought into Malaysia thus creating sufficient tax presence here. We are satisfied that in the circumstances of the case, as the commercial transaction was undertaken through the respondent ('contractor'), a tax presence was created within Malaysia to enable a levy to be imposed. Lord Scarman in *Clark (Inspector of Taxes) v Oceanic Contractors Ltd* [1983] 2 AC 130 had occasion to clarify on the issue of tax presence in the following manner:

> But the present case is concerned with the territorial limitation to be implied into a section which establishes a method of tax collection. The method is to require the person paying the income to deduct it from his payments and account for it to the revenue. The only critical factor, so far as collection is concerned, is whether in the circumstances it can be made effective. A trading presence in the United Kingdom will suffice ...

[69] It must be understood that in the instant case, the levy is on the contract sum to be paid in Malaysia to the registered contractor's accounts ie the respondent, and not to individual consortium members. The certificate of registration of 28 June 2000 concretises this trading presence (see para 15 for clarification).

CONCLUSION

[70] For the above reasons we find substance in the submission of learned counsel for the appellant. We hold the view that the EPCC contract is a lump sum contract and find no justification to split the contract sum into different parts, according to the work done by the individual member contractors.

[71] The EPCC contract is a comprehensive contract and includes both construction and non-construction components.

[72] We hold that the appellant has not construed the Act and the relevant documents wrongly or has imposed an incorrect levy amount on the respondent.

[73] For the above reasons, we allow the appellant's appeal.

[74] Questions 1(i) and (iv) are to be answered in the positive whilst questions 1(ii) and (iii) are to be answered in the negative. As the appellant did not submit on question 2 we refrain from answering it.

[75] Costs.

Appeal allowed.

Reported by Afiq Mohamad Noor